Public Prosecutor v Gan Boon Aun & Anor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-09–258–11 OF 2011
APANDI ALI, LINTON ALBERT AND HAMID SULTAN JJCA
6 SEPTEMBER 2013

Criminal Procedure — Appeal — Notice of appeal — Application to amend — Whether courts had discretion to condone application — Whether omission to include second respondent ought to be condoned — Whether respondent's objection had merit — Appeal against constitutional question — Whether rules of compliance were less strict in such appeals — Rules of the Court of Appeal 1994 r 4

The respondents were charged in the sessions court for having committed an offence under the Securities Industry Act 1983 ('the SIA'). At the close of the prosecution case, the trial judge ruled that a prima facie case had been established and called for the respondents to enter their defence. The respondents obtained leave to make a referral of a constitutional question to the High Court, namely whether s 122(1) of the SIA was inconsistent with art 5(1) of the Federal Constitution ('Constitution'). The High Court ruled in favour of the respondents and held that s 122(1) of the SIA was inconsistent with art 5(1) of the Constitution and thus ought to be struck down as unconstitutional. The appellant appealed against this decision. However, at the case management stage the appellant discovered that its notice of appeal omitted to include the second respondent's name. This was the appellant's application to amend the notice of appeal to include the second respondent, as well as seek leave to file the amended notice of appeal against the second respondent out of time. The grounds for the application were primarily based on omission and genuine mistake. The appellant also contended that the court had a wide discretion under s 56 of the Courts of the Judicature Act 1964 to condone appeals out of time and appeals with formal defects. The second respondent opposed the application.

Held, allowing the application:

(1) When the statute places judicial discretion on the court to condone or not to condone an irregularity, whether it is substantive or procedural, the court had a wide discretion to act and decide upon it judiciously and not arbitrarily. In the present case, there was no delay in the filing of the appeal and the real question was whether the omission to include the second respondent ought to be condoned. Further, art 5(1) of the Constitution would not be applicable as the appeal was not one related to conviction or acquittal of the accused after trial (see paras 12–13).

(2) As it was the respondents who had framed the constitutional question for judicial decision and until the apex court dealt with it the issue would not be settled, it did not lie in the mouth of the respondent to obstruct the constitutional question from being ventilated by the apex court. When it came to constitutional question, procedural compliance, time frame or technicalities were never seen as an issue unless the applicant attempted abuse the process of court. In the circumstances, the respondent's application to object to the application on the facts of the present case was abhorrent to the notion of justice and fair play and should be seen to be an abuse of process of court. There was no merit in the respondent's objection, especially since the appeal against the constitutional question had already been filed within time. In any case, even if the present application was dismissed and subsequently the Court of Appeal or the Federal Court set aside the decision of the High Court on the constitutional issue, the respondent would still have to proceed with the defence case at the sessions court (see paras 14–15).

(3) Further, when it came to amendment, the Rules of the Court of Appeal 1994 ('RCA') gave very wide powers to the court to exercise its discretion according to the justice of the case. Rule 4 of the RCA provides that the procedure and practice in the Rules of Court 2012 'shall apply mutatis mutandis'. In the instant case, applying r 4 of the RCA and allowing the amendment would make the amendment retrospective as was the practice and procedure in civil cases. Once the amendment was allowed the prayer to file the notice out of time would become academic by operation of law as the amended notice of appeal would be deemed to have been filed within time and according to law. Thus, the amendment was allowed with the amended notice of appeal to be filed and served within ten days from the date of this order (see paras 16–19).

[Bahasa Malaysia summary

Responden-responden telah dituduh di mahkamah sesyen kerana melakukan kesalahan di bawah Akta Perindustrian Sekuriti 1983 ('APS'). Di penutup kes pendakwaan, hakim perbicaraan memutuskan bahawa kes prima facie telah dibuktikan dan memanggil responden-responden memasukkan pembelaan mereka. Responden-responden telah memperoleh kebenaran untuk membuat rujukan satu persoalan perlembagaan kepada Mahkamah Tinggi, iaitu sama ada s 122(1) APS adalah tidak konsisten dengan perkara 5(1) Perlembagaan Persekutuan ('Perlembagaan'). Mahkamah Tinggi memutuskan menyebelahi responden-responden dan memutuskan bahawa s 122(1) APS adalah tidak konsisten dengan perkara 5(1) Perlembagaan dan oleh itu patut dibatalkan kerana tidak berperlembagaan. Perayu telah merayu terhadap keputusan ini. Walau bagaimanapun, di peringkat kes pengurusan perayu mendapati bahawa notis rayuannya tertinggal untuk memasukkan nama responden kedua. Ini adalah permohonan perayu untuk meminda notis rayuan untuk memasukkan

responden kedua, dan juga memohon kebenaran untuk memfailkan notis rayuan yang dipinda terhadap responden kedua di luar had masa. Alasan-alasan untuk permohonan itu terutamanya adalah berdasarkan peninggalan dan kesilapan yang bukan dibuat-buat. Perayu juga berhujah bahawa mahkamah mempunyai budi bicara luas di bawah s 56 Akta Mahkamah Kehakiman 1964 untuk membenarkan rayuan-rayuan di luar had masa dan rayuan-rayuan dengan kecacatan formal. Responden kedua membantah permohonan itu.

Diputuskan, membenarkan permohonan:

(1) Apabila statut meletakkan budi bicara kehakiman ke atas mahkamah untuk membenarkan atau tidak membenarkan luar aturan, sama ada ia substantif atau prosedural, mahkamah mempunyai budi bicara luas untuk bertindak dan memutuskannya secara kehakiman dan bukan sewenang-wenangnya. Dalam kes ini, tiada kelewatan dalam memfailkan rayuan itu dan persoalan sebenar adalah sama ada peninggalan untuk memasukkan responden kedua patut dibenarkan. Selanjutnya, perkara 5(1) Perlembagaan tidak terpakai kerana rayuan itu tiada kaitan dengan sabitan atau pelepasan tertuduh selepas perbicaraan (lihat perenggan 12–13).

(2) Oleh kerana responden-responden yang mengemukakan persoalan perlembagaan itu untuk keputusan kehakiman dan sehingga mahkamah tertinggi mengendalikannya maka isu tersebut tidak akan selesai, ia bukan terletak pada responden untuk membantah persoalan perlembagaan itu daripada dibicarakan di mahkamah. Jika ia berkaitan persoalan perlembagaan pematuhan prosedural, jangka masa atau aspek teknikal tidak dilihat sebagai suatu isu kecuali pemohon cuba menyalahguna proses mahkamah. Dalam keadaan berikut, permohonan responden untuk membantah permohonan itu bedasarkan fakta kes ini adalah menghina konsep keadilan dan keadilan itu sendiri dan patut dilihat sebagai satu penyalahgunaan proses mahkamah. Tiada merit dalam bantahan responden, terutamanya kerana rayuan terhadap persoalan perlembagaan itu telah pun difailkan dalam tempoh masa. Dalam apa keadaan, meskipun permohonan ini telah ditolak dan berikutan itu Mahkamah Rayuan atau Mahkamah Persekutuan mengetepikan keputusan Mahkamah Tinggi berhubung isu perlembagaan itu, responden masih boleh meneruskan kes pembelaan di mahkamah sesyen (lihat perenggan 14–15).

(3) Selanjutnya, apabila ia berkaitan pindaan, Kaedah-Kaedah Mahkamah Rayuan 1994 ('KMR') memberi kuasa luas kepada mahkamah untuk melaksanakan budi bicaranya menurut keadilan kes itu. Kaedah 4 KKMR memperuntukkan bahawa prosedur dan amalan dalam Kaedah-Kaedah Mahkamah 2012 'shall apply mutatis mutandis'. Dalam

kes ini, dengan mengguna pakai k 4 KMR dan membenarkan pindaan akan menjadikan pindaan itu kebelakangan seperti mana amalan dan prosedur dalam kes-kes sivil. Apabila pindaan dibenarkan permohonan untuk memfailkan notis di luar had masa menjadi akademik melalui operasi undang-undang kerana notis rayuan yang dipinda adalah dianggap telah difailkan dalam had masa dan menurut undang-undang. Oleh itu, pindaan itu dibenarkan dengan notis rayuan yang dipindah difailkan dan disampaikan dalam tempoh sepuluh hari dari tarikh perintah ini (lihat perenggan 16–19).]

Cases referred to

Muhammad Asri bin Bakar v PP [1996] 1 LNS 496, HC (refd)
Nilabati Behera Alias Lalita Behera v State of Orissa and Another AIR 1993 SC 1960, SC (refd)
Ong Cheng Aik v Dayco Products Singapore Pte Ltd (in liquidation) [2005] 2 SLR 561, CA (refd)
Pendakwa Raya lwn v Karpal Singh a/l Ram Singh [2012] 4 MLJ 443; [2012] 5 CLJ 580, CA (refd)
PP v Ismail bin Abdul Wahab [2014] 1 MLJ 541; [2013] 1 LNS 291, CA (refd)
Veerasingam v PP [1958] 1 MLJ 76, CA (refd)
Wong Swee Chin v PP [1977] 2 MLJ 194, FC (refd)
Yap Ee Bee v Pendakwa Raya [1999] MLJU 131, HC (refd)
Yusof Rahmat & Co v Kamal bin Mohamad Noor: Asiah binti Mahmud (Intervenor) [2004] MLJU 117, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 56
Federal Constitution art 5(1)
Rules of Court 2012
Rules of the Court of Appeal 1994 r 4
Securities Industry Act 1983 (repealed by Capital Markets and Services Act 2007) s 122(1)

Appeal from: Criminal Reference No 43–17 of 2011 (High Court, Kuala Lumpur)

Shanti Geoffrey (Mohd Hafiz and Munira Masood with her) (Attorney General's Chambers) for the appellant.
Hisyam Teh Poh Teik (NS Guok and Stephanie Wong with him) (Tan Hock Chuan & Co) for the respondents.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant's application, encl 8(a) to amend the notice of appeal to include another respondent which was inadvertently left out and also to seek leave to file the amended notice of appeal out of time came up for hearing on 24 April 2013 and upon hearing the same, the application was allowed. My learned brothers Mohamed Apandi Ali JCA and Linton Albert JCA have read the draft judgment and approved the same. This is our judgment.

BRIEF FACTS

[2] Gan Boon Aun and Khiudin bin Mohd were charged in the sessions court for an offence under the Securities Industry Act 1983. The charge and alternative charge read as follows:

Principal charge:

> That you, between 28 February 2006 to 15 February 2007, at Bursa Malaysia Securities Berhad, Exchange Square, Bukit Kewangan, 50200 Kuala Lumpur, in the Federal Territory of Kuala Lumpur, abetted Transmile Group Berhad (Company No 373741-W) in making a statement that is misleading in a material particular in Transmile Group Berhad's 'Quarterly Report On Unaudited Consolidated Results For The Financial Year Ended 31 December 2006' and the misleading statement is underlined in red in the Appendix to this charge, and the said statement is likely to induce the purchase of securities of Transmile Group Berhad by other persons, and when the statement was made Transmile Group Berhad ought reasonably to have known the statement is misleading in a material particular, and you have thereby committed an offence under s86(b) read together with s 122C(c) of the Securities Industry Act 1983 (Act 280) and punishable under s 88B of the same Act.

Alternative charge:

> That Transmile Group Berhad (Company No 373741-W) between 14 February 2007 and 15 February 2007 at Bursa Malaysia Securities Berhad, Exchange Square, Bukit Kewangan, 50200 Kuala Lumpur, in the Federal Territory of Kuala Lumpur, has committed an offence under s 122B(a)(bb) of the Securities Industry Act 1983 (Act 280) when it, with intent to deceive, furnished a misleading statement to Bursa Malaysia Securities Berhad in Transmile Group Berhad's 'Quarterly Report On Unaudited Consolidated Results For The Financial Year Ended 31 December 2006' and the misleading statement is underlined in red in the Appendix to this charge and that you, who at the time of the commission of the offence was a director of Transmile Group Berhad, are deemed to have committed an offence under s 122B(a)(bb) read together with s 122(1) of the Securities Industry Act 1983, and punishable under s 122B of the same Act.

[3] The trial against both the accused proceeded before the sessions court

and at the end of the prosecution case the learned sessions judge ruled that a prima facie case has been established and called for defence.

[4] At the commencement of the defence case the defence made an application for a referral of a constitutional question to the High Court, which was permitted by the learned sessions judge. The question posed before the High Court under case registration No 43–17 of 2011 was as follows:

> Whether the provision of s 122(1) (Act 280) of the Securities Industry Act 1983 is inconsistent with art 5(1) of the Federal Constitution as it contravenes the presumption of innocence and ought to be struck down as being unconstitutional and therefore void.

[5] The High Court ruled in favour of both the accused and held that s 122(1) of the Securities Industry Act 1983 was inconsistent with art 5(1) of the Federal Constitution as it contravened the presumption of innocence and ought to be struck down as unconstitutional.

[6] The appellant being dissatisfied, within time filed an appeal against the said decision naming only Gan Boon Aun and in the notice of appeal had omitted to include the name of Khiudin bin Mohd and in consequence had filed this application to amend the notice of appeal as well as a measure of prudence to seek leave to file the amended notice of appeal against Khiudin bin Mohd out of time.

[7] The appellant has set out the grounds of the application, and is substantially based on omission that it was a genuine mistake. In addition, the appellant had only come to know of the omission when the learned deputy registrar of the Court of Appeal pointed out the error during the case management stage.

[8] The appellant in reliance of s 56 of the Courts of Judicature Act 1964 submits that the court has wide discretion to condone appeals out of time and formal defect and relies on a number of cases in this area of jurisprudence namely: (a) *Veerasingam v Public Prosecutor* [1958] 1 MLJ 76, (b) *Pendakwa Raya lwn Karpal Singh a/l Ram Singh* [2012] 4 MLJ 443; [2012] 5 CLJ 580, (c) *Yusof Rahmat & Co v Kamal bin Mohamad Noor: Asiah binti Mahmud (Intervenor)* [2004] MLJU 117, (d) *Ong Cheng Aik v Dayco Products Singapore Pte Ltd (in liquidation)* [2005] 2 SLR 561.

[9] Section 56 of the Courts of Judicature Act 1964 reads as follows:

> The Court of Appeal may in its discretion, on the application of any person desirous of appealing who may be debarred from so doing by reason of his not having observed some formality or some requirement of this Act, permit an appeal upon

such terms and with such directions as it may consider desirable in order that substantial justice may be done in the matter, and may, for the purpose, enlarge any period of time prescribed by ss 51 or 53.

[10] The learned counsel for the respondent (Khiudin bin Mohd) opposed the application and had relied on a number of cases to drive home the point why the application should not be allowed. The cases relied on are as follows: (a) *Wong Swee Chin v Public Prosecutor* [1977] 2 MLJ 194, (b) *Muhammad Asri bin Bakar v Public Prosecutor* [1996] 1 LNS 496 (c) *Yap Ee Bee v Pendakwa Raya* [1999] MLJU 131.

[11] We do not wish to elaborate or repeat what was said in those cases save to say when the statute places judicial discretion to the court to condone or not to condone an irregularity whether it is substantive or procedural, the court has wide discretion to act and decide upon it judiciously and not arbitrarily. Judicially means taking into cognisance the jurisprudence, as well as the judgments of other courts and very importantly the facts of the case, public interest and constitutional importance of the matter etc. In consequence no one case will be binding on the court where the facts are different.

[12] This panel had dealt with this area of jurisprudence in great detail in *Public Prosecutor v Ismail bin Abdul Wahab* [2014] 1 MLJ 541; [2013] 1 LNS 291, and we have refused to allow the public prosecutor to file notice of appeal out of time and more so when the application to condone delay was not filed promptly. The panel of the Court of Appeal on the facts of the case had this to say:

> [12] We agree with the learned deputy public prosecutor that the court has discretion to condone delay in filing of notice of appeal. However, in our view the discretion should not be exercised and/or sparingly exercised when it relates to notice of appeal by the public prosecutor as *opposed to the accused* and the discretion to condone delay in respect of petition of appeal must be readily given unless it will result in miscarriage of justice, (Emphasis added). Our reasons, inter alia, are as follows:
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> (a) At common law the prosecution could not easily maintain a criminal appeal against the decision of the jury on all issues, more so on finding of facts.
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> (b) Article 5(1) of the Federal Constitution gives special protection to the accused. The article reads as follows:
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> > No person shall be deprived of his life or personal liberty save in accordance with law.
>
> (c) Section 307 of the CPC as well as s 51 of the CJA 1964 requires the notice to be filed within 14 days. That is the law and s 56 only relates to discretion and in the light of art 5(1) it is doubtful whether discretion can be exercised

A to defeat the constitutional provision. We are of the view that such discretion should not be exercised to the detriment of the accused/respondent.

[13] The Indian equivalent of art 5(1) is art 21 of the Indian Constitution. In India the
B fundamental guarantee provision for protection of life and personal liberty has a rider, that is to say 'except according to procedure established by law'. The said Indian article reads as follows:

'No person shall be deprived of his life or personal property except according to procedure established by law.'

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[14] Article 5(1) has no such rider and in our considered view the procedure by way of discretion of court to extend time to file notice of appeal against the accused cannot be sustained in light of art 5(1) of the Federal Constitution. Law in our Constitution and Procedure in the Indian Constitution cannot be treated as synonymous, when exercising discretion. Law reflects element of certainty and procedure paves way for
D flexibility, discretion and judicial arbitrariness. In consequence it is our considered view that discretion should not be exercised against the accused when the law is that the prosecution must file the notice of appeal within 14 days.

[15] In the instant case notice of appeal was not filed according to the law and no
E application was filed to condone delay. On such facts we have no hesitation in dismissing the appeal in limine. In consequence the appeal is dismissed.

[13] In the instant case, there was no delay in filing the appeal in respect of the constitutional question as opposed to acquittal or conviction. The
F distinction must be kept in mind. The real question is whether the omission ought to be condoned. In addition, art 5(1) of the Federal Constitution will not be applicable as the appeal is not one related to conviction or acquittal of the accused after trial, as was in the case of *Public Prosecutor v Ismail Abdul Wahab* (above).

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[14] Further, it was the accused who had framed the constitutional question for judicial decision and until the apex court deals with it, the issue will not be settled and it does not lie in the mouth of the respondent to obstruct a constitutional question to be ventilated by the apex court. When it comes to
H constitutional question, procedural compliance, time frame or technicalities, are never seen as an issue unless the applicant attempts to abuse the process of court. Support for the proposition is found in a number of cases. For example, the Indian Supreme Court had dealt with constitutional issues based on a complaint letter, where the statute or rules of court were nor adhered to. And
I to protect the constitutional rights, lack of procedural requirements was not treated by the Supreme Court as an issue at all (see *Nilabati Behera Alias Lalita Behera v State of Orissa and Another* AIR 1993 SC 1960)).

[15] The respondent's application to object to the application on the facts of

the instant case is abhorrent to the notion of justice and fair play and must also be seen to be an abuse of process of court, more so when it is an attempt to obstruct a constitutional question to be ventilated by the apex court which the respondent himself has raised. We find no merit in the respondent's objection. In addition, the respondent's objection is also misconceived for the following reasons:

(a) The appeal against the constitutional question has already been filed within time.

(b) On the assumption we dismiss the prosecution application for amendment and subsequently the Court of Appeal or the Federal Court set aside the decision of the High Court on the constitutional issue, the respondent will still have to proceed with the defence case at the sessions court.

[16] Further, when it comes to amendment, the Rules of the Court of Appeal 1994 ('RCA 1994') gives very wide powers to the court to exercise its discretion according to the justice of the case whether or not it is civil or criminal case as the 'appellant' under the RCA 1994 means:

'appellant" means a person desirous of appealing from a decision of the High Court to the Court of Appeal and includes a person who has been convicted for a criminal offence in any court and who by any written law is entitled to appeal to the Court of Appeal'.

[17] Further, r 4 of the RCA 1994 particularly says the procedure and practice in the Rules of Court 2012 shall apply mutatis mutandis. Rule 4 states:

Where no other provision is made by any written law or by these Rules, the procedure and practice in the Rules of Court 2012 shall apply mutatis mutandis.

[18] In the instant case, by applying r 4 and allowing the amendment will make the amendment retrospective as is the practice and procedure in civil cases (see RC 2012). Once the amendment is allowed the prayer to file out of time will become academic by operation of law as the amended notice of appeal will be deemed to have been filed within time and according to law. And the granting of leave here to file the amended notice of appeal must only be seen as a consequential order.

[19] In consequence, the application in encl 8(a) is allowed and the amended notice of appeal is to be filed and served within ten days from the date of this order.

We hereby order so.

Application allowed.

Reported by Afiq Mohamad Noor